**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

**MARK NEWBY,**

**Plaintiff**

**vs.**

**ENRON CORP., et al.,**

**Defendants.**

**Civil Action No. H-01-3624**
**(Securities Suits)**

**BRIEF OF AMICUS CURIAE THE STATE OF WISCONSIN INVESTMENT BOARD REGARDING THE APPLICATION OF THE FLORIDA STATE BOARD OF ADMINISTRATION AND THE NEW YORK CITY PENSION FUNDS TO SERVE AS LEAD PLAINTIFFS**

## I. STATEMENT OF INTEREST

The State of Wisconsin Investment Board ("SWIB") is a member of the class in this litigation. SWIB has losses stemming from its investments in both Enron Corporation stock and bonds during the class period of over $40 million. In general, SWIB is an active participant in the corporate governance arena. SWIB has been and will continue to serve as a lead plaintiff in securities fraud class actions,[1] and any restrictions imposed on institutional investors acting as lead plaintiffs in this proceeding can adversely affect SWIB's ability to act as a lead plaintiff in other future proceedings. For these reasons, SWIB has an interest in the Court's interpretation of the limitation on "professional plaintiffs" contained in the Private Securities Litigation Reform Act of 1995 (the "PSLRA" or the "Act"), 15 U.S.C. § 78u-4(a)(3)(B)(vi). SWIB urges the Court to adopt an interpretation, consistent with both the text of the statute and its legislative history, by which the Court will exercise its discretion to exempt institutional investors from the limitation when doing so promotes the objectives of the Act.

## II. INTRODUCTION

SWIB makes this submission to urge the Court to exercise its discretion and to waive the "profession plaintiff" limitation contained in the Private Securities Litigation Reform Act ("PSLRA") when considering the joint motion for appointment of the Florida State Board of Administration ("FSBA") and the New York City Pensions Funds ("NYC Funds") as lead plaintiff in this action.

Other candidates for lead plaintiff have noted that the PSLRA limits to five the number of times a person may serve as a lead plaintiff in a three year period. They contend that FSBA is thereby barred from serving as a lead plaintiff in this case. This limit is not, however, automatic. As both the text of the PSLRA and its legislative history make clear, the Court has

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[1] See, infra, at n.10.

discretion to waive the limit and must exercise that discretion in a manner consistent with the objectives of the PSLRA.

The twin questions for the Court in this case are to define the objectives of the PSLRA and to determine when its discretion should be exercised to override the PSLRA's "five-in-three" limit. SWIB urges the Court to avoid an interpretation of the "five-in-three" provision that would discourage institutional investors from taking the lead in securities fraud class actions when they are willing and able to manage and direct the litigation and have negotiated for and retained qualified counsel at a competitive rate.

While SWIB takes no position as to which group of lead plaintiff applicants would be the most adequate in this case, SWIB does believe that the present situation warrants the Court's exercise of discretion to allow FSBA, along with the NYC Funds, to exceed the PSLRA's limit.

## III. THE COURT MAY EXERCISE ITS DISCRETION TO PERMIT SELECT PLAINTIFFS TO APPEAR IN MORE THAN FIVE SUITS IN THREE YEARS IN ORDER TO FURTHER THE ACT'S OBJECTIVES

The PSLRA restricts "professional plaintiffs" from repeatedly serving as lead plaintiff in securities fraud class actions brought pursuant to the Act:

> Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff . . . in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

15 U.S.C. § 78u-4(a)(3)(B)(vi). The plain language of the Act makes clear, however, that application of this section is not automatic. Instead, the statute vests the Court with discretion to waive the provision if such waiver is consistent with the objectives of the PSLRA.

While the argument can be made that Congress clearly intended that this provision not apply at all to institutional investors, the Court need not reach this question in this

case. At a minimum, the legislative history, like the statute itself, supports the Court's exercise of discretion to apply or not apply the provision in a manner consistent with the PSLRA's purposes:

> The Conference Report seeks to restrict professional plaintiffs from serving as lead plaintiff by limiting a person from serving in that capacity more than five times in three years. Institutional investors seeking to serve as lead plaintiff may need to exceed this limitation and do not represent the type of professional plaintiff this legislation seeks to restrict. As a result, the Conference Committee grants courts discretion to avoid the unintended consequence of disqualifying institutional investors from serving more than five times in three years.

Statement of Managers: "The Private Securities Litigation Reform Act of 1995," H.R. Rep. No. 369, 104th Cong., 1st Sess. 35 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 734 (emphasis added).[2]

A number of courts that have considered both the text and the legislative history of the statute have recognized the discretion vested in them to carry out the Act's objectives in applying this provision. See, e.g., Piven v. Sykes Enterprises, Inc., 137 F. Supp. 2d 1295, 1304 (M.D. Fl. 2000) ("the restriction on 'professional plaintiffs' is not absolute, as the language in the PSLRA clearly grants the Court the power to appoint a lead plaintiff despite its having served as lead plaintiff in five other suits within the past three years."); In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1112 ("The PSLRA explicitly authorizes the Court to permit a prospective lead plaintiff to exceed the limitation of 15 U.S.C. § 78u-4(3)(B)(vi), by providing at the beginning of the statute, '[e]xcept as the Court may otherwise permit.'"); In re Network Associates, Inc. Sec. Litig., 76 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999) ("The Conference

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[2] "The report of a conference committee is important to a determination of congressional intent, and because the conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of Congressional intent." In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380, 1399 n.33 (5th Cir. 1986) (internal quotations and citations omitted).

Report, however, made clear that an institutional investor like the Board may be granted special leave to serve beyond the limit.").

The question then is under what circumstances should the Court exercise that discretion.

## IV. THE ACT SEEKS TO ENCOURAGE THE PARTICIPATION OF INSTITUTIONAL INVESTORS AND TO REQUIRE THAT CLIENTS CONTROL THEIR LITIGATION AND THEIR LAWYERS.

The PSLRA was intended to reform class action securities litigation practices and "empower investors so that they, not their lawyers, control securities litigation." See H.R. Rep. No. 369, 104th Cong., 1st Sess. 33 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 732; S. Rep. No. 98, 104th Cong., 1st Sess. 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 685.

To accomplish its objective, Congress codified a procedure regarding the selection of lead plaintiffs and lead counsel. Congress took away from attorneys the decision as to which investor will represent the class and gave it to the court. Congress required the court to look initially to overall financial interest in the relief sought by the class, see 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), but ultimately to whether the lead plaintiff candidate is adequate to represent the class, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Under the Act, the court must "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(i).

Congress also took away from attorneys the decision as to which counsel will represent the class and, subject to judicial oversight and review, gave it to the court-appointed lead plaintiff. "The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v). The legislative history states that "[Congress] expects that the plaintiff will choose counsel rather than, as is true today,

counsel choosing the plaintiff." H.R. Rep. No. 369, 1995 U.S.C.C.A.N. at 734. Congress intended "to restore lawyers and clients to their traditional roles . . . ." S. Rep. No. 98, 1995 U.S.C.C.A.N. at 689.[3]

Simply put, the goal of the statute is to appoint lead plaintiffs who are sufficiently knowledgeable to call the shots in class action securities fraud litigation by selecting competent counsel and negotiating rates in the best interest of absent class members.[4] These plaintiffs should not act as pawns in the hands of plaintiffs' counsel.

To further this objective, Congress designed the Act to encourage large institutions to participate in class action securities litigation. H.R. Rep. No. 369, reprinted in 1995 U.S.C.C.A.N. at 733. Congress favored institutional investors serving as representatives in securities class actions. Congress believed they would improve the quality of representation, because their sophistication and financial interests would enable them to select competent class counsel at more favorable terms and motivate them to play an active role in litigation strategy. Id.

Overall, Congress intended to establish a statutory scheme that would would increase investors' ultimate recovery in class action securities fraud litigation. The Act's

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[3] The Third Circuit in In re Cendant Corp. Litig., 264 F.3d 201, 254 (3d Cir. 2001), recently described the benefits of these traditional client/lawyer roles which Congress embedded in the PSLRA:

> The power to select counsel lets clients choose lawyers with whom they are comfortable and in whose ability and integrity they have confidence. The power to negotiate the terms under which counsel is retained confers upon clients the ability to craft fee agreements that promise to hold down lawyers' fees and that work to align their lawyers' economic interests with their own. And the power to monitor lawyers' performance and to communicate concerns allows clients to police their lawyers' conduct and thus prevent shirking. This regime has served the American legal system well for a very long time.

[4] See Berger v. Compaq Computer Corp., ____ F.3d ____, 2002 WL 46918 (5th Cir. Jan. 14, 2002) ("we mean to emphasize that Congress enacted the 'lead plaintiff' provisions of the PSLRA, 15 USC § 780-4(a)(3)(B), to direct courts to appoint, as lead plaintiff, the most sophisticated investor available and willing so to serve in a putative securities class action . . . . [T]he lead plaintiff should be an investor capable of understanding and controlling the litigation.").

legislative history is peppered with comments regarding excessive attorney fee awards under the old system. See, e.g., H.R. Rep. No. 369, 1995 U.S.C.C.A.N. at 735 ("Counsel in securities class actions often receive a disproportionate share of settlement awards."). By vesting the lead plaintiff with control over the litigation and with the right, subject to court approval, to select and retain counsel to represent the class, Congress sought to reduce attorneys' fees and costs typically associated with securities litigation.[5]

The text and legislative history of the Act thus indicate that Congress intended to promote three objectives through the lead plaintiff appointment process. First, Congress sought to encourage the participation of institutional investors as lead plaintiffs in securities fraud class actions. Second, securities fraud class actions should be led by lead plaintiffs who are willing and able to oversee and direct, to the extent possible, the course and outcome of the litigation. Third, the lead plaintiff is responsible for retaining competent counsel at a competitive rate to represent the investor class. It is with these goals in mind that the Court should exercise its discretion in applying the professional plaintiff restriction. When these goals will be promoted, the Court should exercise its discretion to waive the "five-in-three" limit. This limit should be applied in a manner that encourages the responsible participation of institutional investors, ensures that clients, not lawyers, control securities litigation, and results in the appointment of a qualified lead plaintiff who has retained qualified counsel to represent the class at a reasonable rate.

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[5] Congress also codified a restriction on attorneys' fees. The Act limits total attorneys' fees and expenses to "a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the clients." 15 U.S.C. § 78u-4(a)(6).

## V. CONCLUSION

FSBA and the NYC Funds have both demonstrated their commitment to actively managing securities class actions, not only to achieve a recovery for the investor class, but also to put in place corporate governance changes designed to reduce future corporate misconduct.[6] They have demonstrated their ability to obtain significant recoveries for investors.[7] They have also sought reduction of counsel fees in certain cases.[8] Moreover, they have taken steps in this case to engage competent counsel at a competitive rate.[9]

Similarly, SWIB has been appointed to serve as lead plaintiff in four securities fraud class actions since 1996.[10] SWIB someday may be defending itself against the "five-in-

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[6]For instance, the NYC Funds was one of the three institutional investor lead plaintiffs in In re Cendant Corp. Litig., Case No. 98-1664 (D.N.J.). The settlement of that litigation resulted in corporate governance changes including the annual election of all directors, prior shareholder approval of the re-pricing of employee stock options, and independent audit, nominating and compensation committees for the Cendant Board of Directors. See Exh. 1 (Corporate Officers and Directors Liability Litig. Rptr., 1/10/00). FSBA achieved corporate governance relief as lead plaintiff in In re UCAR Int'l Inc. Sec. Litig., Case No. 98-CV-0600 (D. Conn.), which included the addition of a new outside director, Mary Cranston, Firm Chair of Pillsbury, Madison & Sutro, LLP, to the Board. See Exh. 2 (Business Wire, 10/14/99). The settlement of In re Samsonite Corp. Sec. Litig., Case No. 98-K-l878 (D. Col.), in which FSBA was a lead plaintiff, also required Samsonite to adopt new corporate governance rules governing conflict of interest safeguards and insider stock sales, and rules assuring a more independent board of directors. See Exh. 3 (Associated Press, 7/26/00).

[7]In Cendant, NYC Funds, along with its co-lead plaintiffs, obtained a settlement of $3.2 billion. See In re Cendant Corp. Litig., 264 F.3d 201, 218 (3d Cir. 2001). In Samsonite, FSBA obtained a $24 million settlement, an amount described as representing approximately 51% of the damages allegedly available at trial. See Exh. 3.

[8]In Cendant, NYC Funds appealed to the Third Circuit to obtain and did obtain approximately a $75 million reduction in attorneys' fees. See Cendant, 264 F.3d at 285. In UCAR, because settlement was achieved early in the litigation, FSBA and its counsel renegotiated counsel fees, reducing them to 22.5% and achieving a savings for the investor class. See Exh. 4, Johnson, Keith L., "The Elephant in Your General Counsel's Office: Managing Losses to Legal Fees in Shareholder Class Actions," NAPPA Report (Nov. 2000).

[9]See Declaration of Leslie A. Conason in Support of the Motion of the New York City Pension Funds for Appointment as Lead Plaintiff and Approval of its Selection of Counsel; Declaration of Leslie A. Conason in Support of Amended Motion of the Florida State Board of Administration and the New York City Pension Funds for Appointment of Co-Lead Plaintiffs and Co-Lead Counsel; Affidavit of Linda Lettera.

[10]SWIB served as lead plaintiff in Gluck v. CellStar Corp., Case No. 3:96-CV-1353R (N.D. Tex.), where a recovery of more than 50% of class damages was obtained, fees were cut to 20%, and corporate governance changes (including addition of an independent director and independent audit committee) were implemented (see Exh. 5); and in Spiegel v. Physician Computer Network, Inc., Case No. 2:98cv981 (D.N.J.), where a substantial recovery was

three" argument advanced by some of the lead plaintiff candidates here. The Act and its legislative history mandate that application of the "five-in-three" limit be subject to the Court's discretion and that such discretion be exercised in a manner consistent with the PSLRA's objectives. Under the circumstances here, SWIB, as both a public institution and a class member in this litigation, urges the Court to avoid basing its lead plaintiff decision on application of the "five-in-three" limit to eliminate the participation of FSBA in this case.

SWIB does not otherwise take a position on which of the applicants in this case should be selected as the most adequate plaintiff.

Dated: January 25, 2002

Respectfully submitted,

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obtained in a bankruptcy sale of the company, legal fees were reduced to 15%, and the CFO personally contributed to the settlement (see Exh. 6). SWIB is also serving as a lead plaintiff in the Just for Feet class action, SWIB v. Ruttenberg, Case No. 2:99cv3097 (N.D. Ala.), and In re Anicom Sec. Litig., Case No. 00-C-4391 (N.D. Ill.), which are both still pending.

Corporate Officers and Directors Liability Litigation
Reporter

January 10, 2000

SECTION: Vol. 15; No. 5; Pg. 10

LENGTH: 962 words

CASE: Securities Fraud:In re Cendant Corp. Securities Litigation

HEADLINE: Cendant Reaches Unprecedented $2.8 Billion Settlement in NJ

BODY:

In what is described by lead counsel as a "landmark" settlement, Cendant Corporation has agreed to pay $2.8 billion in cash to shareholders who filed suit after an April 1998 disclosure of massive accounting irregularities triggered a 47 percent drop in share prices the next day. The settlement is the highest recovery ever obtained in a securities class action and requires Cendant to institute corporate governance changes. In re Cendant Corporation Securities Litigation, No. 98-1664 (WHW) (D NJ, settlement announced Dec. 7, 1999).

Following the settlement announcement, the accounting firm Ernst & Young, L.L.P., agreed on Dec. 17 to pay an additional $335 million to settle the case, according to the California Public Employees' Retirement System (CalPERS), one of the lead plaintiffs in the case.

"This settlement is significant not just for its size," said Charles P. Valdes , Chairman of CalPERS Investment Committee. "It sends a strong message that corporate responsibility goes beyond the corporation and extends to accounting firms upon whom pension funds and other investors rely in making investment decisions."

Lead counsel in the case, Philadelphia's Barrack, Rodos & Bacine and New York's Bernstein Litowitz Berger & Grossman, said the settlement (not including Ernst & Young's share) is three times the highest recovery ever obtained in a securities class action and about 10 times the recovery in the next largest case.

Of equal significance, said Leonard Barrack of Barrack, Rodos & Bacine , is Cendant's agreement to implement changes in its corporate governance structure which should help "ensur e that the type of fraud that occurred here will not be repeated. These changes include: --

The Board's Audit, Nominating, and Compensation Committees will each be comprised entirely of independent directors; --

All directors will be elected annually; and --

No employee stock option will be "re-priced" following its grant without shareholder approval.

"The settlement effectively brings closure to this most unfortunate event," said Henry R. Silverman, Cendant's chairman, president, and COO. "Further action lies in the hands of the U.S. Attorney and the SEC, each of which we believe is aggressively pursuing responsible parties.... W e expect that these matters will not affect the Company or its current officers and directors."

Lead counsel plans to submit a formal stipulation of settlement in early January and expects a final settlement hearing to be held in April 2000.

Background

EXHIBIT 1

Cendant is a diverse corporation that provides, among other things, services for consumer shopping, mortgage loans, and real estate brokerage. It was created through a merger of CUC International Inc. and HFS Inc. in December 1997.

Shortly after the merger, Cendant announced it had uncovered substantial accounting irregularities at CUC and that it would have to restate its 1997 earnings. The next day, its stock price fell 47 percent. More than 60 shareholder suits were filed against the company; the cases were consolidated in May 1998.

In September 1998, District Judge William H. Walls appointed two lead plaintiffs in the case: New York State Common Retirement Fund and various New York City Pension Funds, and CalPERS.

After a competitive bid process, Judge Walls selected Bernstein Litowitz and Barrack, Rodos & Bacine to serve as lead counsel in October 1998.

Plaintiff's Stock Option Suit Against Individual Defendants Dismissed

In an earlier opinion, Judge Walls dismissed claims against the individual officers and directors in the suit filed by Eileen McLaughlin, a former CUC and Cendant employee who participated in the stock option plan. She received 66,863 options between 1990 and 1994 and 7,777 in April 1997. She resigned from Cendant in March 1998, about a month before the company's disclosures, and had four months from her departure date to exercise her options.

Judge Walls ruled that McLaughlin lacks standing to pursue claims under Section 10(b) against former Cendant chairman Walter Forbes because of the absence of any purchase or sale of the options. The plan was both compulsory and noncontributory, and she did not receive her options as part of a bargained-for exchange that required her to make an affirmative investment decision, the judge said.

Even if she did have standing, there are serious doubts she could demonstrate how the so-called "purchase" of options acquired between 1990 and 1994 was made in connection with fraud allegedly commencing in fiscal 1995, Judge Walls said. Dismissal of the Section 10(b) claim precludes holding Forbes liable as a control person under Section 20(a), he held.

As for the options acquired in 1997, McLaughlin contends they were "purchased" in lieu of accepting cash compensation, but that unsupported assertion is insufficient to create Section 10(b) standing, the judge said. Although she moved to amend the 1997-related claim to demonstrate standing, the proposed amendment fails to meet the heightened pleading requirements for fraud, he said. McLaughlin's general pleading that Forbes knew of earlier CUC accounting adjustments lacks the necessary details to infer scienter for both Section 10(b) and common law fraud liability.

Judge Walls also dismissed a fiduciary duty count against two former CUC directors and four former HFS directors, saying neither set of directors owed her a fiduciary duty under her employee stock option plan. He denied leave to amend that count as futile.

Cendant is represented by Jonathan Lerner and Samuel Kadet of Skadden Arps Slate Meagher & Flom.

(Call 877-595-0449 for the 13-page opinion.)

LOAD-DATE: February 7, 2000

Business Wire

October 14, 1999, Thursday

DISTRIBUTION: Business Editors

LENGTH: 865 words

HEADLINE: UCAR International Settles Securities Class Action and Shareholder Derivative Lawsuits

DATELINE: NASHVILLE, Tenn.

BODY:

Oct. 14, 1999--UCAR International Inc. (NYSE: UCR) announced today that it has entered into agreements settling the securities class action and shareholder derivative lawsuits which have been pending against it since 1998. "These settlements mark a major milestone and turning point for UCAR in resolving our remaining contingencies," commented Mr. Gilbert E. Playford, Chairman and Chief Executive Officer. "We are now able to move forward on our plans for the future, with a new management team and new growth strategies, without the overhang of these lawsuits. Our legal and finance staffs have done an outstanding job in managing stage by stage the containment and resolution of these contingencies. Since the inception of the antitrust investigation, we have paid out about $200 million in fines and customer settlements and today our total debt level is lower than the second quarter 1998, all during a time of difficult market conditions for our major product lines." Under the settlements, $40.5 million will be contributed to one or more escrow accounts for the benefit of former and current stockholders who are members of the class for whom the securities class action was brought, as well as plaintiffs' attorney's fees. UCAR will contribute $11 million and the insurers under UCAR's directors and officers insurance policies at the time the lawsuits were filed will contribute the balance of $29.5 million. UCAR expects to incur about $2.0 million of unreimbursed expenses related to the lawsuits. These expenses, combined with the $11.0 million, will be recorded as a one-time special charge to operations of $13.0 million in the third quarter ending September 30, 1999.

The impact on net income will be approximately $8.5 million, or $0.18 per diluted share. As previously disclosed, UCAR has not made any provisions for these lawsuits since they were in their early stages and no estimable evaluation of liability was determinable. In addition, a new outside director, acceptable to both UCAR and the lead securities class action plaintiff, the Florida State Board of Administration, the eighth largest state employees' pension fund, will be added to UCAR's Board of Directors by May, 2000. The class is expected to consist of all purchasers of UCAR common stock during the period from August 10, 1995 through March 31, 1998 other than UCAR, the other defendants and certain related parties. The settlements provide for a full release of UCAR, the other defendants and certain related parties from all claims and liabilities arising out of public disclosures, failures to make public disclosures and breaches of fiduciary duty during the class period. The settlements are subject to court approval, court certification of the class, customary notice and termination provisions, and other terms and conditions. Satisfaction of all conditions and completion of judicial and statutory procedures are expected to take about 120 days. The securities class action is pending in the U.S. District Court for the District of Connecticut. The shareholder derivative action is pending in the Connecticut Superior Court. Full details of the settlements will be set forth in filings with the courts. UCAR International Inc. is the world's largest manufacturer of high quality graphite and carbon electrodes and cathodes as well as flexible graphite. We sell our products in over 80 countries and own manufacturing facilities located on four continents. Graphite electrodes, our principal product, are consumed primarily in the production of steel in electric arc furnaces, the steel making technology used by all "mini-mills", and for the refining steel in ladle furnaces. Carbon electrodes are consumed primarily in the production of silicon metal. Cathodes are used in production of aluminum. Flexible graphite is used in gaskets and for other sealing purposes as well as flow field plates in PEM fuel cells. We also manufacture other graphite and carbon products.

NOTE: This news release contains forward-looking statements as defined in the Private Securities Litigation Reform Act of 1995. These include statements about such matters as the impact of the settlements on us. We have no duty to update such statements. Actual future events and circumstances could differ materially from those set forth in these statements

EXHIBIT 2

due to various factors, including failure to obtain court approval of the settlements, UCAR's termination of the settlements because purchasers representing a substantial amount of the claims covered by the settlements elect to opt-out of the settlements, and other risks and uncertainties, including those detailed in our filings with the SEC. For news releases via fax dial 1-800-239-5323. For additional information on UCAR call 1-615-760-7700 or visit the company's website at http://www.ucar.com.

CONTACT: UCAR International Inc., Nashville
Joel L. Hawthorne, 615/760-7791

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URL: http://www.businesswire.com

LOAD-DATE: October 15, 1999

The Associated Press State & Local Wire



July 26, 2000, Wednesday, BC cycle

SECTION: Business News; State and Regional

LENGTH: 261 words

HEADLINE: Samsonite to pay $24 million in lawsuit settlement

DATELINE: DENVER

BODY:

Samsonite Corp. will pay $24 million to settle a class-action lawsuit brought by shareholders who claimed the luggage-maker misled investors about its financial prospects.

U.S. District Judge John Kane approved the settlement Tuesday, two years after the first shareholder lawsuit was filed after the stock had sunk to a fraction of its record high of $51.75 in October 1997.

The Denver-based luggage-maker also has agreed to adopt new corporate governance rules covering conflict of interest safeguards and insider stock sales, and rules assuring a more independent board of directors.

In court documents, attorneys for the plaintiffs and defense acknowledged the settlement was hastened by the company's "poor financial condition . . . thus increasing the likelihood of Samsonite declaring bankruptcy should plaintiffs obtain a judgment after trial."

Keith Park, lead counsel for the shareholders, described the settlement as a "significant victory" for shareholders given the uncertainty of a trial and Samsonite's defense.

Park said the settlement represented 51 percent of the $46 million plaintiffs could have recovered in a favorable trial verdict.

"This is a remarkable result," said Park, noting that only one out of 26,000 class members objected to the cash settlement.

The suit was filed on behalf of investors who owned Samsonite common stock between September 1996 and August 1998. Plaintiffs alleged the stock was traded at inflated prices fueled by false financial reports issued by the company's top executives.

SAMC (NASDAQ) (95%);

JOHN KANE (72%);

LOAD-DATE: July 27, 2000

EXHIBIT 3

# The Elephant in Your General Counsel's Office: Managing Losses to Legal Fees in Shareholder Class Actions

*By Keith L. Johnson, State of Wisconsin Investment Board*
*and Douglas M. Hagerman, Foley & Lardner*

## What is All That Cendant Fuss About?

You have probably heard about the $262 million fee award to plaintiffs' counsel that was approved by Judge Walls over the objection of one of the lead plaintiffs out of the $3 billion Cendant recovery. Though the fee was only slightly over eight percent of the total recovery, it provided class counsel with an hourly rate of almost $11,000.

Difficult facts can make bad law. Citing concerns raised about the impact of campaign contributions on the lead counsel selection process, Judge Walls had felt compelled to step into the role of lead plaintiff and re-bid the Cendant fee arrangements himself. Unfortunately, this resulted in an unintended increase of $76 million over the fee schedule that had been negotiated by the lead plaintiffs. But it does provide an illustration of the trouble judges can get into when they take over the role of one of the litigants in a pending case. Presented with the unsavory task of determining whether a well-intentioned deal he had cut for the plaintiffs was fair, Judge Walls found it was "appropriate and reasonable".[1]

While the Cendant fee elephant was easy to spot because of its size, it is only one of an enormous herd that may be stampeding through your pension fund general counsel's office at this very minute. There were at least 238 securities class actions filed in 1999 and a record 265 filed in 1998.[2] The Stanford Securities Class Action Clearinghouse estimated in early 1998 that the settlement value of cases pending at that time was roughly $2 to $3 billion.[3] Average legal fee awards to plaintiffs' counsel have been running at about 31 percent of recoveries.[4] At 31 percent a pop, that could have the plaintiffs' bar chasing after about $1 billion in fees. If your fund files claims in class action recoveries, some of those fees will come right out of the pockets of your beneficiaries.

## Reforming the Class Action Fee Award Process

While the Cendant fee controversy was boiling, several public pension funds were taking actions elsewhere, beneath the radar, to develop a base for reform of the class action fee award process. That included establishing data on what competitive market fees would be in securities class action lawsuits.

A number of cases have come full circle where public funds used marketplace competition to negotiate fee arrangements with lead counsel. The result was that class fees were cut by half or even more. For example, fee awards in cases where the State of Wisconsin Investment Board (SWIB) was lead plaintiff came in at 18 percent in the CellStar[5] settlement and 15 percent in Physicians Computer Network.[6] The New York City Employees Retirement System (NYCERS) cut fees to 15 percent in Orbital Sciences.[7] The Florida public pension fund obtained a 22.5 percent fee award in UCAR International.[8] In the California Micro case, Colorado PERA and California STRS achieved a settlement with fees lower than eight percent.[9]

While each case is different and a 31 percent fee might be appropriate in some cases that are hard fought or where a superlative result is achieved, it appears that market fees are substantially below the levels that the courts have been awarding in most cases. Is this making some members of the traditional plaintiffs' bar nervous? It appears so. Let's look at several cases where public funds have challenged legal fee requests that looked excessive.

## Lessons Learned from the Ascend Case

Together with the NYCERS, SWIB recently negotiated a fee reduction in the shareholder class action against Ascend Communications,[10] without even filing an objection. Several things learned from that experience might benefit other funds when considering whether to challenge fee requests in shareholder class action settlements.

An initial observation is in order. Many of the practices that have become customary in securities class actions reward unproductive activity by class counsel, leave class members in the dark, and lead to lower net recoveries. By challenging these practices, institutions need not view the plaintiffs' bar as the enemy. Indeed, firms that successfully prosecute contingent fee shareholder class actions should be well-compensated for their efforts in a manner that aligns their interests with members of the class.

The Case. It was a typical class action. Ascend allegedly misrepresented the viability and launch date of a key product. The product was never successfully launched, the stock tanked, and shareholders lost hundreds of millions of dollars. Traditional plaintiffs' bar firms filed numerous suits in the same district. One firm filed in a different district to get a tactical advantage. Two other firms assembled a "group" of unrelated investors and – with no sizeable institution applying for lead plaintiff status – won the lead plaintiff and lead counsel battle. Yet another firm later filed a state court class action with an overlapping class period.

These duplicative activities had no apparent benefit to the class. The defendants successfully moved to dismiss, but the lead plaintiff was permitted to replead. The case settled before a new complaint was filed. No merits discovery on the class' claims ever occurred.

The Settlement. Lead counsel negotiated a $5.45 million settlement that provided class members with less than 2 percent of estimated recoverable losses. about 3 cents per share. Despite this result that could only be described as very modest, lead counsel applied for a fee award of "up to" 33 1/3 percent of the settlement. The settlement notice provided that objections to the settlement and fee award were due before the date when counsel would file their fee



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EXHIBIT 4

petition. When they became aware of this as class members, SWIB and NYCERS jointly retained counsel and engaged in a discussion with plaintiffs' counsel. Prior to filing any objection, lead counsel agreed to reduce the fee request to 22.5 percent of the settlement.

Taking into consideration the costs of filing and prosecuting an objection, SWIB and NYCERS decided to accept the 22.5 percent as a compromise. Then, when the 22.5 percent fee petition was filed, the class members were finally able to see some of what was really happening.

**Lesson 1: The Plaintiffs' Bar Takes Care Of Its Own.** Even though only two firms were appointed lead counsel and the case never got past a motion to dismiss, the fee petition included 25 different law firms in the lodestar (total hours worked). Most of those firms had done nothing to benefit the class. Some had merely filed a duplicative case. Others had been unsuccessful competitors for lead counsel. The firm that filed the state court case used the fact the defendants would not settle the main federal case without settling the state court case to obtain a portion of the fee award. One plaintiffs' bar lawyer described this practice of including everyone in the fee petition as their standard "business model."

From a class members' perspective, there is no rational reason why more than a few firms should have been included in the fee petition, when only a few firms contributed to the class' recovery. While some argue that the class should not be concerned with the number of law firms working on a case as long as the fee is fair, paying each firm that filed a case simply encourages "piling on" and reduces competition between firms. One of the results is that fees are kept above market levels because there are so many other "mouths to feed."

**Lesson 2: The Plaintiffs' Bar Often Attempts To Avoid Disclosing Useful Information About Their Fees.** Despite the fact that they knew that NYCERS and SWIB were scrutinizing the fee petition, the plaintiffs' firms in Ascend did not detail their lodestar for the court. Only one firm (out of 25) provided even the amount of their time spent on the case. The other 24 firms did not provide information about what they did, how many hours it took, what the hourly rates were, and how their work benefited the class. Yet counsel argued in their fee petition that the lodestar was $1.8 million. Since no detail was provided, it was impossible to tell whether the firms actually spent anything approaching that level of effort on the case.

**Lesson 3: Lodestars Are Ridiculously Bloated.** How could someone run up $1.8 million in fees doing little more than investigating and filing a case, getting a class certified, and unsuccessfully briefing a motion to dismiss? Would any "real" client ever pay such a fee? We think not.

When no client is watching the bill, it is easier to include unproductive activities, such as time spent copying someone else's complaint and filing it, filing parallel cases in state court ~~(actions)~~, and fighting over lead plaintiff/lead counsel appointments. Multiple lawyers can attend hearings, meetings, and depositions where one or two lawyers would suffice. Hourly rates (which are often a fiction since many of these firms do virtually all of their work on a contingency basis) are sky-high. One firm in the Ascend case charged average hourly rates of $389.

Finally, the costs portion of the fee petition (which is typically added on to the percentage fee) provides another avenue for shenanigans. In Ascend, the firms managed to spend over $110,000 on paralegals, even though discovery never started, and billed it as a "cost" to get around the contingency limit on fees. Would a real client pay for paralegal time as a "cost" rather than part of fees?

**Lesson 4: The Class Members Pay For The Lead Plaintiff Battle.** By paying the firms that unsuccessfully seek lead plaintiff/lead counsel appointment (as was done in Ascend), lead counsel combatants can win even when they lose. From a class member's perspective, there is no reason why any firm other than the successful firm should get fees paid for the lead plaintiff battle. The class may also be asked to pay for the costs – such as mass solicitation mailings – of firms that unsuccessfully vie for lead counsel appointment, even though those costs did not benefit the class in any way.

**Lesson 5: Settlements Are Often Structured So The Class Has To Object To Fee Petitions Before They Are Even Filed.** In most cases, settlement notices call for class members to state their objections to fee awards by a deadline that is set to pass before class counsel even files the fee petition. Thus, class members must decide whether to object to something they haven't seen! This appears to be a patent violation of the due process rights of class members. In the Ascend case, the settlement notice said that counsel would seek "up to" 33 1/3 %, provided no information about counsel's lodestar, gave no notice that 25 firms would participate in the fee award, and was of little help to NYCERS and SWIB in determining whether the fee petition was objectionable. Since courts do not seem to recognize this problem, class members will have to raise the issue repeatedly until this practice changes.

**Lesson 6: Absent Competitive Bidding Or Intervention By The Court, Class Counsel Get A Hefty Percentage Even If They Essentially Lose The Case.** Public fund experience with competitive bidding shows that competitive market fees are substantially lower than what is typically being awarded to plaintiffs' firms. In Ascend, counsel notified the class it would seek up to one-third of a minimal recovery that was achieved at an early stage of the litigation (but not quickly – the settlement notice was mailed 31 months after the case was filed). Based on SWIB's experience in the CellStar and Physicians Computer Network bidding process, such a result would have earned counsel a fee of 12.5 percent or less for a minimal recovery early in the case.

## Other Cases Where Fees Were Reduced

Ascend is not the only case where excessive fee requests have been successfully challenged. SWIB negotiated a fee reduction to 22 percent from the 30 percent provided for in the settlement notice in the Exide case, a case that involved a modest settlement obtained right after the consolidated complaint was filed.[11] Colorado PERA got lead counsel to agree to a 25 percent fee in the Chiron case after filing a notice of objection with the court pointing out that the settlement notice specified a 30 percent fee of an undetermined settlement amount.[12] In the Horizon/CMS case, SWIB and Colorado PERA filed an objection when the settlement notice specified the fee would be up

to one-third of a modest, early settlement, and the court awarded a 20 percent fee.[13] The court also ordered that the funds' legal fees incurred in pursuing the objection be paid by class counsel out of their fee award.

## Setting a New Standard

Given the amount of money involved, institutional investors have a big incentive to reform the process for awarding legal fees in securities class actions. Early successes show that the traditional plaintiffs' bar is keenly aware of problems in the current process and will reduce vulnerable fee requests when challenged. A cost/benefit analysis for proactive class action legal fee management through challenges in appropriate cases would likely support greater activity by institutional investors than has taken place to date.

To see what might be in it for you, look at your fund's class action recoveries and calculate how much more you would have received if the fee deductions had been cut in half. The authors highly recommend attention to potential fee challenges as a tool that can be used to increase returns for fund beneficiaries, both in individual cases and through reform of the securities class action litigation process over the long run.

*Keith Johnson is Chief Legal Counsel for the State of Wisconsin Investment Board. Doug Hagerman is with the Chicago office of Foley & Lardner and represented SWIB and NYCERS in the Ascend case. The views expressed in this article are those of the authors and not of their clients.*

**ENDNOTES:**

[1] Judge Walls' opinion on the Cendant fee award is reported re Cendant Corporation Securities Litigation,2000 WL 116 (D.N.J. 8/16/00).

[2] New Tide Rising in Securities Class Action Litigation, Se ties Reform Act Litigation Reporter, Volume 9, Number 6, Septe 2000.

[3] Securities Class Action Litigation in Q1 1998: A Repc NASDAQ, <http;//securities.stanford.edu/report/nasdaq/98q1.ht

[4] See supra, Note 2.

[5] State of Wisconsin Investment Board v. Goldfield, Civil A No. 3:96-CV-1353-R (N.D.Tex.).

[6] In re Physicians Computer Network Securities Litigation, No. 98-981 (D.N.J.).

[7] In re Orbital Sciences Corporation Securities Litigation, Action No. 99-197-A (E.D.Va.).

[8] In re UCAR International Inc. Securities Litigation, 3098-00600(JBA) (D.Ct).

[9] In re California Micro Devices Securities Litigation, No. C 2817-VRW (N.D.Ca.).

[10] In re Ascend Communications Securities Litigation, Case 97-8861 MRP (C.D. Cal.).

[11] In re Exide Corporation Securities Litigation, Case No. 98-60061-AA (E.D. Mich.).

[12] Perera v. Chiron Corporation, No. C-95-20725-EAI (N.D.

[13] In re Horizon/CMS Healthcare Corporation Securities Lit tion, 3 F.Sup.2d 1208 (D.N.M. 1998).

SECURITIES
# Class Action ALERT

*The Authoritative Report on Shareholder Litigation*

10 Mountainview Road, Upper Saddle River, NJ 07458 TEL: 201-236-9777

Volume 12, Issue 1 January 1999

**Settlements**

## CellStar Corporation

| | |
|---|---|
| **Class Period:** | February 28, 1995 to Aril 12, 1996 |
| **Deadline for Filing a Claim:** | March 15, 1999 |
| **Settlement Fund:** | $14,500,000 |

### *Class Definition*

All persons, other than defendants, who purchased or otherwise acquired shares of the common stock of CellStar Corporation ("CellStar") during the period from February 28, 1995 through and including Aril 12, 1996 and were damaged thereby.

### *CUSIP Numbers*

150925-10-5

### *Notices & Forms*

CellStar Securities Litigation
C/o Claims Administrator
The Garden City Group, Inc.
P.O. Box 9318
Garden City, NY 11530-9318

### *Hearing*

January 25, 1999 (9:30 a.m.)
USDC Northern District of Texas
Dallas Division
U.S. Courthouse
1100 Commerce Street
Dallas, Texas
Honorable Jerry Buchmeyer

*in this issue*



EXHIBIT 5

*in this issue*



# CellStar Corporation (cont'd)

***Case Summary***

Case No.96-cv-1353-R
The named defendants are CellStar Corp.;
Alan H. Goldfield, CEO & Chairman;
Terry S. Parker, President & COO;
Kenneth W. Sanders, CFO & Treasurer;
John S. Bain, Director of Investor Relations; Evelyn M. Henry, and Leonard Ratley.
The defendants deny any and all wrongdoing.

CellStar is organized under the laws of the State of Delaware and maintains its principal executive offices in Carrollton, Texas.

CellStar holds itself out as an integrated wholesaler and retailer of cellular phones and other wireless telecommunications consumer products, with operations in the United States, the Asia-Pacific region and Latin America. On the wholesale level, the Company is reportedly one of the world's largest non-carrier distributors of cellular phones for Motorola, Inc. ("Motorola"), Nokia Mobile Phones, Inc. ("Nokia"), Ericsson Inc. ("Ericsson") and NEC Corporation ("NEC"). The Company also describes itself as a large retailer of wireless telecommunications products and services operating, as of March 1996, 366 retail locations in the United States, 33 retail locations in Latin America and seven retail locations in the Asia-Pacific region.

Prior to and throughout the Class Period, CellStar was portrayed as a booming wireless and cellular wholesaler/retailer which was experiencing rapidly rising sales and profits in its established markets and new domestic and international ventures. This case involves defendants' dissemination of materially false and misleading statements and omissions regarding CellStar's expected sales and profitability, adverse competitive pressures, deficient internal controls and secret efforts to reduce its bloated inventories by oversupplying distributors and affiliates, which saturated its markets and caused sales and profits to stagnate in the first quarter of fiscal 1996. At all relevant times, the Company had caused or encouraged positive earnings estimates by financial analysts which were false, misleading and lacking in reasonable basis due to the undisclosed impact of the adverse factors. Defendants' scheme drove CellStar's stock price to a Class Period high of $37 1/8 per share; in light of the recent adverse disclosures regarding the Company as set forth below the stock price of CellStar common stock has fallen to as low as $5 3/4 per share.

At all relevant times, defendants were aware of deteriorating

*in this issue*



# CellStar Corporation (cont'd)

***Case Summary***

sales and profitability trends in their established domestic wholesale businesses and Sam's Clubs outlets. They also recognized, however, that if they invested a relatively nominal sum to acquire up to 100% of the CellStar Asia operations and additional shares representing up to 80% of CellStar Pacific, they would be able to include in fiscal 1995 financial statements revenues of those Asian subsidiaries on a consolidated basis, and thereby increase CellStar's total reported consolidated revenues by over $50 million, as reported, by the Company's own admission, in its 1995 Form 10-K filed with the SEC. The sales in the Asia-Pacific region, however, were in large part non-bona fide sales to other wholesalers who were accorded concessionary terms and/or secret or effective rights of return which should have prevented those sales from being incorporated as a component of CellStar's revenues under GAAP. CellStar induced Motorola to underwrite the costs of its acquisition of a 100% interest of CellStar Asia by offering Motorola, through this transaction, an enhanced opportunity to dispose of Motorola's own excess inventories by dumping them, through CellStar Asia, in the Asia-Pacific market. Similarly, CellStar engaged in a variety of aggressive sales tactics in its domestic markets during the Class Period which also incorporated explicit or implicit rights of return that CellStar failed to reflect in its accounting for revenues and/or for which CellStar failed to take proper reserves.

At all relevant times, CellStar was experiencing serious problems that undermined its attainment of growth expectations which defendants had formulated in their budgetary process and caused or encouraged analysts to incorporate into their estimates and which investors and the market relied upon in connection with the purchase and sale and price of CellStar securities in the marketplace. These problems consisted of the following:

That CellStar lacked sufficient and adequate internal financial and operating controls and distribution systems to enable or permit the Company to fairly and accurately value CellStar'' assets and compute its operating results and to achieve continued successful and profitable expansion;

That turmoil and disruption in the Company's financial and support staffs were distracting from the Company's implementation of adequate internal financial controls and reporting procedures;

That beginning in the third quarter of fiscal 1995, as inventories mounted due to the combined effect of weak internal controls and pressure from Motorola to acquire additional inventories from it, the Individual Defendants devised a scheme to engage in non-bona fide sales of inventories to certain large wholesalers and subsidiaries, domestic and international, by which the Company could

## CellStar Corporation (cont'd)

*Case Summary*

generate purported revenues and reduce inventories but where the requirements for revenue recognition under GAAP were not satisfied or proper reserves were not recorded;

That CellStar, in order to conceal the deficiencies of its internal controls and to reduce its bloated inventory levels, was implementing extreme and aggressive measures to induce certain of its customers, both domestic and international, to take shipments of its products. Such measures included drastic price reductions, increasingly concessionary payment terms, secret guarantees of returns and/or price protection, provisional sales, extended payment terms and other incentives which severely caused CellStar's operating expenses to rise;

That CellStar, in order to conceal the deficiencies of its internal controls and to reduce its bloated inventory levels, was secretly engaging in a number of practices, both domestically and internationally, to artificially and improperly boost its reported sales, net income and earnings per share, including granting its distributors and/or customers unqualified, or, at the very least, tacit rights of return of products "purchased" while at the same time providing lenient payment terms which resulted in its distributors and dealers not having to pay for merchandise unless and until they resold it;

That CellStar was recording and reporting revenue on "sale" of inventory where its customers had reserved a right of return of the cellular products and where CellStar had no way to reasonably or in good faith estimate the amount of product that ultimately would be returned to it.

That CellStar was improperly recording revenue on the "sale" of said inventory when CellStar was in effect "parking" its inventory with certain wholesalers and subsidiaries (in which it owned less than a 50% interest), as to which principles of consolidation do not apply, and had no way to reasonably or in good faith estimate the amount of the products that would be eventually returned by those wholesalers or subsidiaries, and that such revenue was artificially boosting the Company's reported earnings so that the Company would meet Company-generated earnings estimates for fiscal year 1995;

That 1995 fourth quarter revenues and earnings of CellStar, as reported, were materially overstated through the improper recognition of revenue, through, among other things, the recognition as revenue of sales which were subject to conditions and were thus not complete, on consignment shipments of CellStar products to distributors and/or dealers even though they had no obligation to pay for it unless they resold it and on shipments of cellular products to distributors and/or dealers who had reserved rights of return;

That CellStar's aggressive tactics in moving its inventories to its customers in the fourth quarter of 1995 oversupplied CellStar's available outlets and saturated its distribution channels, blocking sales growth in the next fiscal quarter and causing the Company's gross profit in the first quarter of fiscal 1996 to decline at the same time that the Company's operating expenses were escalating;

That CellStar, because of its relationship with and dependence upon Motorola, wa. required to purchase increasing levels of Motorola products during the Class Period, which products the Company was forced to dispose of at razor-thin margins, given its bloated inventories, fierce competition from other cellular

# CellStar Corporation (cont'd)

*Case Summary*

producers and distributors or wholesalers or retailers and a weakening U.S. market for cellular products in the fourth quarter of fiscal 1995;
That CellStar's Sam's Clubs outlets were failing to contribute in any meaningful way to profitability and growth and were imposing logistical complexities, start-up costs and personnel costs that substantially eroded the bottom line; and
That, as a result of the foregoing adverse factors, the statements made, caused by or attributable to defendants during the Class Period which were presented or could be construed as forward-looking in nature were knowingly lacking in reasonable basis at all relevant times and materially distorted investors' assessment of the Company's stock.

*Settlement Summary*

The Plan of Allocation establishes three damages periods within the Class Period for which damages will be calculated. The Plan of Allocation is designed in this manner because: (1) the price of CellStar stock declined during the Settlement Class Period for reasons unrelated to Defendants' actions; and (2) CellStar made disclosures at different times during the Settlement Class Period, each of which affected the stock price. During the Early Class Period, the maximum damages increase from $1.00 to $4.20 per share, in a straight line method over that period. The maximum damages for the Re-Release Period are constant at $7.63 per share. The maximum damages for the Late Period are constant at $4.20 per share.

A Claim will be calculated as follows:

There are three damages periods for which claims will be calculated:
From the beginning of the Class Period (2/28/95) to the date immediately prior to CellStar's pre-announcement of 1995 fourth quarter earnings (1/14/96 (the "Early Class Period").
From the release of CellStar's 1995 fourth quarter earnings (1/15/96) through CellStar's re-release of 1995 fourth quarter earnings (2/25/96) (the "Re-Release Period").
From the period immediately after CellStar's re-release of fourth quarter earnings (2/26/96) through the end of the Class Period (4/12/96) (the "Late Class Period").

Damages for CellStar shares sold before April 13, 1996:
For CellStar shares purchased during the Early Class Period and sold on or before February 25, 1996, the claim per share is $0.00.
For CellStar shares purchased during the Early Class Period and sold after February 25, 1996 and before April 13, 1996, the claim per share is the lesser of: (1) the amount actually paid for the stock minus the amount actually received in the sale of the stock; or (2) $1.00 + ((number of trading days through the Early Class Period on which the stock was bought divided by the total number of trading days in the Early Class Period) x $2.43).
For CellStar shares purchased during the Re-Release Period and sold on or before February 25, 1996, the claim per share is $0.00.
For CellStar shares purchased during the Re-Release Period and sold after February 25, 1996, the claim per share is the lesser of: (1) the amount actually

# CellStar Corporation (cont'd)

***Settlement Summary***

paid for the stock minus the amount actually received in the sale of the stock; or (2) $3.43.
For CellStar shares purchased during the Late Class Period and sold before April 13, 1996, the claim per shares is $0.00.

Damages for CellStar shares sold on or after April 13, 1996.
For CellStar shares purchased during the Early Class Period and sold on or after April 13, 1996, the claim per share is the lesser of: (1) the amount actually paid for the stock minus the greater of (a) the amount actually received in the sale of the stock, or (b) the mean price of CellStar stock during the look back period prior to the sale of the stock ( which for holders on or after July 11, 1996 is $9.17); or (2) $1.00 + ((number of trading days through the Early Class Period on which the stock was bought divided by the total number of trading days in the Early Class Period) x $3.20).
For CellStar shares purchased during the Re-Release Period and sold on or after April 13, 1996, the claim per share is the lesser of: (1) the amount actually paid for the stock minus the greater of (a) the amount actually received in the sale of the stock, or (b) the mean price of CellStar stock during the look back period prior to the sale of the stock (which for holders on or after July 11, 1996 is $9.17); or (2) $7.63.
For CellStar shares purchased during the Late Class Period and sold on or after April 13, 1996, the claim per share is the lesser of: (1) the amount actually paid for the stock minus the greater of (a) the amount actually received in the sale of the stock, or (b) the mean price of CellStar stock during the look back period prior to the sale of the stock (which for holders on or after Jully 11, 1996 is $9.17); or (2) $4.20.

In processing claims, the first-in, first-out basis ("FIFO") will be applied to both purchases and sales. Sales will be matched in chronological order first against the shares held on February 27, 1995, and then against purchases during the Class Period.

The date of purchase or sale is the "contract" or "trade" date as distinguished form the "settlement" date. The determination of the price paid per share and the price received per share, shall be exclusive of all commissions, taxes, fees and charges.

***Attorneys, Fees & Expenses***

Plaintiffs - Grant & Eisenhofer

Defendants - Haynes & Boone
Bracewell & Patterson

Attorneys' fees in the amount of Two Million Six Hundred Seventeen Thousand Five Hundred dollars, which is equivalent to approximately 18% of the Settlement Fund. In addition, Settlement Class Counsel will seek reimbursement of expenses actually incurred, which approximates $400,000, which were advanced in connection with the Litigation, including expenses incurred for experts.

# Physician Computer Network Inc.

**Class Period:** February 21, 1996 to April 1, 1998

**Deadline for Filing a Claim:** April 28, 2000

**Settlement Fund:** $2,150,000 in cash plus Medical Manager common stock worth $19,000,000 plus 50% of Net Proceeds from insurance policies in the event they obtain a recovery from the Insurance Policies at some future date. Partial

*Class Definition*

All persons or entities who purchased or acquired Physician Computer Network Inc. ("PCN") common stock from February 21, 1996 through April 1, 1998.

*CUSIP Numbers*

71940K-10-9

*Notices & Forms*

Physician Computer Network Inc. Securities Litigation
The Garden City Group
P.O. Box 9353
Garden City, NY 11530-9353

*Objection/Exclusion Deadline*

March 13, 2000

*Hearing*

March 22, 2000 (9:00 a.m.)
USDC District of New Jersey
Martin Luther King, Jr. Courthouse; Courtroom 5B
Newark, NJ 07101
Honorable Dickinson Debevoise

*Case Summary*

Case No. 98-981
The settling defendants are Physician Computer Network Inc. ("PCNI"); Henry Green, President, CEO; Jeffry Picower, Chairman of the Board; Frederick Frank, Chairman of Audit Committee; and Frederic Greenberg, director.
The defendants deny any and all wrongdoing.

The settlement does not dispose of claims asserted against John Mortell and Thomas Wraback, or potential claims that the Class may possess against Non-Parties including KPMG Peat Marwick ("KPMG"), PCN's independent auditors during the class period.

On December 7, 1999, PCN and certain direct and indirect subsidiaries filed petitions for reorganization in the United States Bankruptcy Court for the District of New Jersey ("Bankruptcy Court") under Chapter 11 of Title 11 of the United States Code. The Plan of Reorganization ("Plan") filed by PCN provides for the Settlement Payment to the Class.
Physician Computer Network, Inc. develops, markets and supports practice management software products for physicians. The Company's software is designed to link its current installed base of approximately 98,000 office-based



EXHIBIT 6

*Case Summary*

## Physician Computer Network Inc.(cont'd)

physicians with hospitals, clinical laboratories, managed care providers, Blue Cross/Blue Shield and Medicare and Medicaid intermediaries.

According to the complaint during the Class Period, defendants reported a string of positive financial results and increasing profit, creating the illusion that PCNI was a strong, successful, growing and profitable company and allowing the Company to collect tens of millions of dollars from unsuspecting investors through a public offering; to acquire two companies, including Wismer-Martin, in exchange for artificially inflated PCNI stock; and to obtain a $110 million credit facility to use for future acquisitions. The Company was so successful at this charade that Health Data Management ranked it as the tenth largest health care information technology company in 1997 and Inc. Magazine ranked the Company among its 100 fastest growing small public companies two years in a row.

However, as was ultimately disclosed, defendants were only able to report these positive financial results as a result of the intentional manipulation of PCNI's financial statements which resulted in the overstatement of PCNI's revenues and understatement of PCNI's expenses. As a result, the Company's reported earnings during the Class Period were materially overstated and the price of the Company's common stock was artificially inflated.

On March 3, 1998, the Company stunned investors by announcing that (i) it would restate its publicly reported financial results for the first three quarters of 1997 because the Company improperly recognized items of expense and revenue; (ii) as a result of the restatement, the Company would report a loss for the first three quarters of Fiscal 1997, and a loss for the entire 1997 year of between $27 million and $31 million (in comparison, the Company reported a profit of more than $16 million in Fiscal 1996); (iii) the Company would take a charge of at least $25 million related to the impairment of intangibles and the carrying value of goodwill. The Company further disclosed that, as a result of these revelations, defendant Mortell had taken a "leave of absence" from the Company, and that the Company was now in violation of financial covenants contained in the Company's senior credit facility, and was in serious risk of default under that facility. Following these disclosures, the price of PCNI common stock plummeted 70 percent, to a price of $1.28125 per share, on extraordinarily heavy volume of more than 10 million shares.

The irregularities in the Company's financial statement were caused by senior management's (i) intentional override of the Company's internal controls; (ii) falsification of shipping cut-off information; (iii) intentional misapplication of revenue recognition, capitalized software and other accounting principles; (iv) entry of fictitious accounting entries on PCNI's books; (v) failure to make objective accounting decisions; and (vi) failure to appropriately segregate accounting duties. As a result, in August 1998, KPMG concluded that the representations obtained from defendants Mortell and Wraback relating to all periods contained in the Fiscal 1996 10-K could no longer be relied upon and withdrew its audit opinion on PCNI's Fiscal 1996 financial statements.

# Physician Computer Network Inc.(cont'd)

*Settlement Summary*

Each Authorized Claimant will be assigned a "Defined Loss."
a.The date of purchase or sale is the "contract" or "trade" date as distinguished from the "settlement' or "payment" date.
b. The Defined Loss for each Authorized Claimant will be calculated by the Claims Administrator as follows:

1.Shares of PCN common stock purchased or otherwise acquired between February 21,
1996 and March 2, 1998 which were still held as of the close of business on April 1, 1998, the Defined Loss for each purchase shall be $4.00 per share, which represents the inflation in each share of PCN common stock as a result of the alleged fraud during that time period as calculated by the expert on damages retained by SWIB and Plaintiffs' Lead Counsel, multiplied by the number of shares purchased or otherwise acquired.
2. For shares of PCN common stock that were acquired as a result of PCN's merger with Wismer-Martin which were still held as of the close of business on April 1, 1998, the defined loss for each share shall be $1.95.
3. Shares of PCN common stock purchased or otherwise acquired between March 3, 1998 and April 1, 1998 which were still held as of the close of business on April 1. 1998, the Defined Loss for each purchase shall be $1.21 per share, which represents the inflation in each share of PCN common stock as a result of the alleged fraud during that time period as calculated by the damages expert for the Class, multiplied by the number of shares purchased or otherwise acquired.
4. Shares of PCN common stock purchased or otherwise acquired between February 21, 1996 and March 2, 1998 and were sold between March 3. 1998 and April 1, 1998, the Defined Loss shall be the lesser of. (a) the amount by which the purchase or acquisition price per share exceeded the sale prices per share multiplied by the number of shares purchased and sold; and (b) $2.79 per share, which represents the difference between the $4.00 per share inflation between February 21, 1996 and March 2, 1998 and the $1.21 per share inflation between March 3, 1998 and April 1, 1998, as described above, multiplied by the number of shares purchased or otherwise acquired.
5. Shares of PCN common stock purchased or otherwise acquired between February 21, 1996 and March 2, 1998 which were sold between February 21, 1996 and March 2, 1998, the Defined Loss is $0 since both the purchase and the sale occurred prior to any disclosure of the alleged accounting irregularities and, as a result, the inflation per share due to the alleged fraud was constant throughout the period.
6. Shares of PCN common stock purchased or otherwise acquired between March 3, 1998 and April 1, 1998 which were sold between March 3, 1998 and April 1, 1998, the Defined Loss is $0 since both the purchase and the sale occurred when the information about the alleged accounting irregularities at PCN was identical.

Each Authorized Claimant who possesses Merger Claims (the "Merger Claimants") shall recover his/her pro rata share of the Net Settlement Fund attributable to settlement of the Merger Claims (but in no event more than $1.95 per share), which shall consist of $300,000 less deductions for Court awarded

## Physician Computer Network Inc.(cont'd)

***Settlement Summary***

attorneys fees and expenses to Merger Lead Counsel.
Any portion of the Net Settlement Fund attributable to settlement of the Merger Claims that remains after Merger Claimants receive a maximum of $1.95 per share, shall be available for distribution to all Authorized Claimants other than Merger Claimants.

Each Authorized Claimant (other than the Merger Claimants) shall receive his/her pro rata share of the Net Settlement Fund, which shall be his/her Defined Loss divided by the total of all Defined Losses to be paid from the Net Settlement Fund, multiplied by the total amount in the Net Settlement Fund.

If the Net Settlement Fund exceeds the sum total amount of the Defined Losses of all Authorized Claimants (other than Merger Claimants) entitled to receive payment out of the Net Settlement Fund, the excess amount in the Net Settlement Fund shall be distributed pro rata to all Authorized Claimants (other than Merger Claimants) entitled to receive payment out of the Net Settlement Fund until such Authorized Claimants have received interest in an amount equal to 100% of their Defined Losses.

Each Authorized Claimant will be required to provide proof of his or her ownership position in PCN common stock as of February 21, 1996 (the first day of the Class Period). Any sales during the Class Period will first be offset against the Authorized Claimant's opening position in PCN common stock as of February 21, 1996. Remaining sales will be offset against the Authorized Claimant's purchases during the Class Period by matching the earliest subsequent sale with the earliest purchase and chronologically thereafter for purposes of the Claim calculations.

All profits on transactions during the Class Period shall be subtracted from all losses to determine the net Claim of each Class Member. If the Class Member made a net profit, the value of his, her or its Claim shall be zero.

If the Authorized Claimant acquired PCN common stock during the Class Period by means of a gift, inheritance or operation of law, the Authorized Claimant's Claim will be computed by using the price of the PCN common stock on the original date of purchase and not the date of transfer, unless the transfer resulted in a taxable event or other change in the cost basis of the securities. To the extent that the PCN common stock was originally purchased prior to commencement of the Class Period, and there was no such taxable event or change in cost basis at the time of transfer, the Authorized Claimant's Claim for that acquisition shall be zero.

***Attorneys, Fees & Expenses***

Plaintiffs - Bernstein Litowitz Berger & Grossmann LLP
Abbey Gardy & Squitieri LLP

Defendants - Davis Polk & Wardwell

Attorneys' fees equal to fifteen percent of the Settlement Fund, and reimbursement of expenses, together with interest earned on said sums. Any fees awarded will be paid pro-rata in stock and cash on the same basis as paid into the Settlement Fund.